

NEBRASKA ADMINISTRATIVE CODE

Title 48 - Department of Banking and Finance

Chapter 12 - FRAUDULENT, DISHONEST AND UNETHICAL BUSINESS PRACTICES

001 GENERAL

001.01 This Rule has been promulgated pursuant to authority delegated to the Director in Section 8-1120(3) of the Securities Act of Nebraska ("Act").

001.02 The Director has determined that this Rule relating to unethical and fraudulent business practices by broker-dealers, agents, investment advisers, federal covered advisers, and investment adviser representatives is consistent with investor protection and is in the public interest.

001.03 The Director may, on a case-by-case basis, and with prior written notice to the affected persons, require adherence to additional standards or policies, as deemed necessary in the public interest.

001.04 The definitions in 48 NAC 2 shall apply to the provisions of this Rule, unless otherwise specified.

001.05 The delineation in this Rule of certain acts and practices is not intended to be all inclusive. Acts or practices not enumerated herein may also be deemed fraudulent or dishonest.

002 FRAUDULENT PRACTICES OF BROKER-DEALERS AND AGENTS. A broker-dealer-or agent who engages in one or more of the following practices shall be deemed to have engaged in an "act, practice, or course of business which operates or would operate as a fraud" as used in Section 8-1102(1)(c) of the Act:

002.01 Entering into a transaction with a customer in any security at an unreasonable price, or at a price not reasonably related to the current market price of the security, or receiving an unreasonable commission or profit.

002.02 Contradicting or negating the importance of any information contained in a prospectus or other offering materials with intent to deceive or mislead, or using any advertising or sales presentation in a deceptive or misleading manner.

002.03 In connection with the offer, sale, or purchase of a security, falsely leading a customer to believe that the broker-dealer or agent is in possession of material, non-public information which would impact on the value of the security.

002.04 In connection with the solicitation of a sale or purchase of a security, engaging in a pattern or practice of making contradictory recommendations to different investors of similar investment objectives for some to sell and others to purchase the same security, at or about the same time, when not justified by the particular circumstance of each investor.

002.05 Failing to make a bona fide public offering of all the securities allotted to a broker-dealer for distribution by, among other things, (1) transferring securities to a customer, another broker-dealer or a fictitious account with the understanding that those securities will be returned to the broker-dealer or its nominees, or (2) "parking" or withholding securities.

002.06 Failing to disclose the firm's present bid and ask price of a particular security at the time of solicitation, and the firm's bid and ask price at the time of execution of the written confirmation.

002.07 Failing to advise the customer, both at the time of solicitation and on the written confirmation, of any and all compensation related to the specific securities transaction which is to be paid to the agent, including commissions, sales charges, or concessions.

002.08 In connection with a principal transaction, failing to disclose, both at the time of solicitation and on the written confirmation, a short inventory position in the firm's account of more than five percent (5%) of the issued and outstanding shares of that class of securities of the issuer, provided that this subsection shall apply only if the firm is a market maker at the time of the solicitation.

002.09 Conducting sales contests in a particular security.

002.10 After a solicited purchase by a customer, failing or refusing, in connection with a principal transaction, to promptly execute sell orders.

002.11 Soliciting a secondary market transaction when there has not been a bona fide distribution in the primary market.

002.12 Engaging in a pattern of compensating an agent in different amounts for effecting contemporaneous sales and purchases in the same security.

002.13 Effecting any transaction in or inducing the purchase or sale of any security by means of any manipulative, deceptive, or other device or contrivance including but not limited to the use of boiler room tactics or use of fictitious or nominee accounts.

002.14 Failing to comply with any prospectus delivery requirement promulgated under any law.

002.15 Allowing a customer to invest inappropriately.

002.16 Representing that a market will be established, or that securities will be subject to an increase in value.

002.17 Willfully delaying delivery of securities purchased or remittance for securities sold.

002.18 In connection with the solicitation of a purchase of a designated security:

002.18A Failing to disclose to the customer the bid and ask price, at which the broker-dealer effects transactions with individual, retail customers, of the

designated security as well as its spread in both percentage and dollar amounts at the time of solicitation and on the trade confirmation documents; or

002.18B Failing to include with the confirmation a written explanation of the bid and ask price.

002.18C The following transactions shall be exempt from the requirements of this Section:

002.18C1 Transactions in which the price of the designated security is five dollars or more, exclusive of costs or charges; provided, however, that if the designated security is a unit composed of one or more securities, the unit price divided by the number of components of the unit other than warrants, options, rights, or similar securities must be five dollars or more, and any component of the unit that is a warrant, option, right, or similar security, or a convertible security must have an exercise price or conversion price of five dollars or more;

002.18C2 Transactions that are not recommended by the broker-dealer or agent;

002.18C3 Transactions by a broker-dealer:

002.18C3a Whose commissions, commission equivalents, and mark-ups from transactions in designated securities during each of the immediately preceding three months, and during eleven or more of the preceding twelve months, did not exceed five percent (5%) of its total commissions, commission-equivalents, and mark-ups from transactions in securities during those months; and

002.18C3b Who has not executed principal transactions in connection with the solicitation to purchase the designated security that is the subject of the transaction in the immediately preceding twelve months.

002.18C4 Any transaction or transactions that, upon prior written request or upon his or her own motion, the Director conditionally or unconditionally exempts as not encompassed within the purposes of this Section.

002.18D For purposes of this Section, the term "designated security" means any equity security other than a security:

002.18D1 Registered, or approved for registration upon notice of issuance, on a national securities exchange, and the issuer of which makes transaction reports available pursuant to 17 CFR 11Aa3-1;

002.18D2 Authorized, or approved for authorization upon notice of issuance, for quotation in the National Association of Securities Dealers Automated Quotation System ("Nasdaq");

002.18D3 Issued by an investment company registered under the Investment Company Act of 1940;

002.18D4 That is a put option or call option issued by The Options Clearing Corporation; or

002.18D5 Issued by a company whose has net tangible assets in excess of \$4,000,000 as demonstrated by financial statements dated less than 15 months previously that the broker-dealer has reviewed and has a reasonable basis to believe are true and complete in relation to the date of the transaction with the person, and are:

002.18D5a The most recent financial statements of the issuer, other than a foreign private issuer, that have been audited and reported on by an independent public accountant in accordance with the provisions of 17 CFR 210.2.02; or

002.18D5b The most recent financial statements of the foreign private issuer that have been filed with the Securities and Exchange Commission (SEC); furnished to the SEC pursuant to 17 CFR 240.12g3-2(b); or prepared in accordance with generally accepted accounting principles in the country of incorporation, audited in compliance with the requirements of that jurisdiction, and reported on by an accountant duly registered and in good standing in accordance with the regulations of that jurisdiction.

003 UNETHICAL PRACTICES FOR BROKER-DEALERS, ISSUER-DEALERS, AND AGENTS. A broker-dealer, issuer-dealer or agent who engages in one or more of the following practices shall be deemed to have engaged in a "dishonest or unethical practice" as used in Section 8-1103(9)(a)(vii) of the Act:

003.01 Any acts or practices enumerated in Section 002 above;

003.02 In connection with the solicitation of a sale or purchase of an Over the Counter ("OTC"), unlisted, non-Nasdaq security, failing to promptly provide the most current prospectus or the most recent periodic report filed under Section 13 of the Securities Exchange Act of 1934 when requested to do so by a customer.

003.03 Marking any order tickets or confirmations as unsolicited when in fact the transaction was solicited.

003.04 Failing to provide documentation of unsolicited sales to the Department upon request, pursuant to 48 NAC 14.

003.05 Failing to provide each customer with a statement of account which, with respect to all OTC non-Nasdaq equity securities in the account, contains a value for each such security based on the closing market bid on a date certain.

003.05A This statement must cover any month in which activity has occurred in a customer's account, but in no event shall be provided less than every three months.

003.05B This Section shall apply only if the firm has been a market maker in such security at any time during the month in which the monthly or quarterly statement is issued.

003.06 Failing to comply with any applicable provision of the conduct Rules of the National Association of Securities Dealers, Inc., or any applicable fair practice or ethical standard promulgated by the SEC or by a self-regulatory organization approved by the SEC, and

003.07 Failing to cooperate with, or providing false or incomplete information to, the Director in connection with an investigation.

004 DISHONEST AND UNETHICAL PRACTICES FOR BROKER-DEALERS AND AGENTS IN CONNECTION WITH THE SALE OF INVESTMENT COMPANY SECURITIES A broker-dealer or agent who engages in one or more of the following practices shall be deemed to have engaged in "dishonest or unethical practices in the securities business" as used in Section 8-1103(9)(a)(vii) of the Act:

004.01 Sales Load Communications:

004.01A In connection with the offer or sale of investment company shares, failing to adequately disclose to a customer all sales charges, including asset based and contingent deferred sales charges, which may be imposed with respect to the purchase, retention or redemption of such shares.

004.01B In connection with the solicitation of investment company shares, stating or implying to a customer that the shares are sold without a commission, are "no load" or have "no sales charge" if there is associated with the purchase of the shares a front-end load, a contingent deferred sales load, a SEC Rule 12b-1 fee or a service fee which exceeds one-quarter of one percent (.25%) of average net fund assets per year, or in the case of closed-end investment company shares, underwriting fees, commissions or other offering expenses.

004.01C In connection with the solicitation of investment company shares, failing to disclose to a customer any relevant:

004.01C1 Sales charge discount on the purchase of shares in dollar amounts at or above a breakpoint. or

004.01C2 Letter of intent feature, if available, which will reduce the sales charges to the customer.

004.01D In connection with the solicitation of investment company shares, recommending to a customer the purchase of a specific class of investment company shares in connection with a multi-class sales charge or fee arrangement without reasonable grounds to believe that the sales charge or fee arrangement associated with such class of shares is suitable and

appropriate based on the customer's investment objectives, financial situation and other securities holdings, and the associated transaction or other fees.

004.02 Recommendations.

004.02A In connection with the solicitation of investment company shares, recommending to a customer the purchase of investment company shares which results in the customer simultaneously holding shares in different investment company portfolios having similar investment objectives and policies without reasonable grounds to believe that such recommendation is suitable and appropriate based on the customer's investment objectives, financial situation and other securities holdings, and any associated transaction charges or other fees.

004.02B In connection with the solicitation of investment company shares, recommending to a customer the liquidation or redemption of investment company shares for the purpose of purchasing shares in a different investment company portfolio having similar investment objectives and policies without reasonable grounds to believe that such recommendation is suitable and appropriate based on the customer's investment objectives, financial situation and other securities holdings and any associated transaction charges or other fees.

004.03 Disclosure Statements.

004.03A In connection with the solicitation of investment company shares, stating or implying to a customer the fund's current yield or income without disclosing the fund's most recent average annual total return, calculated in a manner prescribed in SEC Form N-1A, for one, five and ten year periods and fully explaining the difference between current yield and total return; provided, however, that if the fund's registration statement under the Securities Act of 1933 has been in effect for less than one, five or ten years, the time during which the registration statement was in effect shall be substituted for the periods otherwise prescribed.

004.03B In connection with the solicitation of investment company shares, stating or implying to a customer that the investment performance of an investment company portfolio is comparable to that of a savings account, certificate of deposit or other bank deposit account without disclosing to the customer that the shares are not insured or otherwise guaranteed by the Federal Deposit Insurance Corporation ("FDIC") or any other government agency and the relevant differences regarding risk, guarantees, fluctuation of principal and/or return, and any other factors which are necessary to ensure that such comparisons are fair, complete and not misleading.

004.03C In connection with the solicitation of investment company shares, stating or implying to a customer, the existence of insurance, credit quality, guarantees or similar features regarding securities held, or proposed to be held, in the investment company's portfolio without disclosing to the customer other kinds of relevant investment risks, including but not limited to, interest rate, market, political, liquidity, or currency exchange risks, which

may adversely affect investment performance and result in loss and/or fluctuation of principal notwithstanding the creditworthiness of such portfolio securities.

004.03D In connection with the offer or sale of investment company shares, stating or implying to a customer that:

004.03D1 The purchase of such shares shortly before an ex-dividend date is advantageous to such customer unless there are specific, clearly described tax or other advantages to the customer, or

004.03D2 A distribution of long-term capital gains by an investment company is part of the income yield from an investment in such shares.

004.03E In connection with the offer or sale of investment company shares, making:

004.03E1 Projections of future performance;

004.03E2 Statements not warranted under existing circumstances; or

004.03E3 Statements based upon non-public information.

004.04 Prospectus. In connection with the solicitation of investment company shares, the delivery of a prospectus shall not be dispositive that the broker-dealer or agent has fulfilled the duties set forth in the subsections of this Rule.

004.05 Definitions. For purposes of this Rule, the following definitions shall apply:

004.05A Recommend means any affirmative act or statement that endorses, solicits, requests, or commends a securities transaction to a customer or any affirmative act or statement that solicits, requests, commands, importunes or intentionally aids such person to engage in such conduct.

004.05B Solicitation means any oral, written or other communications used to offer or sell investment company shares excluding any proxy statement, report to shareholders, or other disclosure document relating to a security covered under Section 18(b)(2) of the Securities Act of 1933 that is required to be and is filed with the SEC or any national securities organization registered under Section 15A of the Securities Exchange Act of 1934.

005 FRAUDULENT AND DISHONEST OR UNETHICAL PRACTICES FOR INVESTMENT ADVISERS, FEDERAL COVERED ADVISERS AND INVESTMENT ADVISER REPRESENTATIVES. An investment adviser, federal covered adviser, or investment adviser representative, or any person who receives any consideration from another person primarily for advising the other person as to the value of securities or their purchase or sale (collectively "adviser") who engages in one or more of the following practices shall be deemed to have engaged in an "act, practice, or course of business which operates or would operate as a fraud" for purposes of Section 8-1102(2)(b) or a "dishonest or unethical practice" as used in Section 8-1102(2)(d) and Section 8-1103(9)(a)(vii) of the Act:

005.01 Recommending the purchase, sale or exchange of any security to a client without reasonable grounds to believe the recommendation is suitable for the client based on:

005.01A Information furnished by the client;

005.01B Reasonable inquiry concerning the client's investment objectives, financial situation and needs by the adviser or its registered representative; and

005.01C Any other information known or acquired by the adviser after reasonable examination of any records provided to the adviser by the client.

005.02 Placing an order to purchase or sell a security for the account of a client without authority to do so.

005.03 Placing an order to purchase or sell a security for the account of a client upon instruction of a third party without first obtaining a written authorization from the client.

005.04 Exercising any discretionary power in placing an order for the purchase or sale of securities without written authorization from the client, unless the discretionary power relates solely to the price at which, or the time when, an order involving a definite amount of specified securities shall be executed, or both.

005.05 Inducing trading in a client's account that is excessive in size and frequency in view of the client's financial resources and investment objectives, and character of the account.

005.06 Borrowing money or securities from a client unless the client is a broker-dealer, an affiliate of the adviser, or a financial institution engaged in the business of loaning funds or securities.

005.07 Loaning money to a client unless the adviser is a financial institution engaged in the business of loaning funds or the client is an affiliate of the adviser.

005.08 Misrepresenting to any client or prospective client, the qualifications of the adviser, its representatives or any employees or the nature of the advisory services being offered or fees to be charged for such service, or omitting to state a material fact necessary to make the statements made regarding qualifications, services or fees not misleading, in light of the circumstances under which they are made.

005.09 Providing a report or recommendation prepared by someone other than the adviser to any client, without disclosing that fact, except where the adviser uses published research reports or statistical analyses to render advice or where an adviser orders such a report in the normal course of providing service.

005.10 Charging a client an excessive advisory fee.

005.11 Failing to disclose any material conflict of interest relating to the adviser, its representatives or any employees, which could reasonably be expected to impair the rendering of unbiased and objective advice, to a client in writing before

entering into or renewing an advisory agreement with that client. Such conflicts include, but are not limited to:

005.11A Receiving compensation relating to advisory services provided to clients which is in addition to compensation received from such clients for such services; and

005.11B Charging a client a fee for rendering advice without disclosing that a commission for executing transactions pursuant to such advice will be received by the adviser, its representatives or its employees, or that the advisory fee will be reduced by the amount of the commission.

005.12 Guaranteeing a client that a specific result (either gain or loss) will be achieved as a result of the advice.

005.13 Publishing, circulating or distributing any advertisement which does not comply with Rule 206(4)-1 under the Investment Advisers Act of 1940, 17 CFR § 275.206(4)-1.

005.14 Disclosing the identity, affairs, or investments of any client to any third party without the client's consent, unless required by law to do so.

005.15 Violating Rule 206(4)-2 under the Investment Advisers Act of 1940, 17 CFR § 275.206(4)-2.

005.16 Entering into, extending or renewing any investment advisory contract, other than a contract for impersonal advisory services as defined in 48 NAC 7.010.06A, unless:

005.16A The contract is in writing; and

005.16B The contract discloses, in substance:

005.16B1 The services to be provided,

005.16B2 The term of the contract,

005.16B3 The advisory fee or the formula for computing the fee,

005.16B4 The amount or the manner of calculation of the amount of the prepaid fee to be returned in the event of contract termination or non-performance,

005.16B5 The discretionary power granted to the adviser or its representatives, if any, and

005.16B6 The contract shall not be assigned by the adviser without the client's consent.

005.17 Employing any device, scheme, or artifice to defraud or engage in any act, practice or course of business which operates or would operate as a fraud or deceit.

005.18 Failing to disclose to any client or prospective client all material facts with respect to:

005.18A A financial condition of the adviser that is reasonably likely to impair the ability of the adviser to meet contractual commitments to clients, if the adviser has discretionary authority (express or implied) or custody over such client's funds or securities, or requires prepayment of advisory fees of more than \$500 from such client, six months or more in advance; or

005.18B A legal or disciplinary event that is material to an evaluation of the adviser's integrity or ability to meet contractual commitments to clients. There shall be a rebuttable presumption that the following legal or disciplinary events involving the adviser or a management person of the adviser ("person") that were not resolved in the person's favor or subsequently reversed, suspended, or vacated are material within the meaning of this paragraph for a period of 10 years from the time of the event:

005.18B1 A criminal action in a court of competent jurisdiction in which the person was convicted or pleaded guilty or nolo contendere ("no contest") to a felony or misdemeanor, or is the named subject of a pending criminal proceeding, involving an investment-related business; fraud, false statements, or omissions; wrongful taking of property; or bribery, forgery, counterfeiting, or extortion.

005.18B2 A criminal or civil action in a court of competent jurisdiction in which the person:

005.18B2a Was found to have been involved in a violation of an investment-related statute or regulation; or

005.18B2b Was the subject of any order, judgment, or decree permanently or temporarily enjoining the person from, or otherwise limiting the person from, engaging in any investment-related activity.

005.18B3 Administrative proceedings before the Director, SEC, any other federal regulatory agency, or any other state agency (collectively "agency") in which the person:

005.18B3a Was found to have caused an investment-related business to lose its authorization to do business; or

005.18B3b Was found to have been involved in a violation of an investment-related statute or regulation and was the subject of an order by the agency denying, suspending, or revoking the authorization of the person to act in, or barring or suspending the person's association with, an investment-related business; or otherwise significantly limiting the person's investment-related activities.

005.18B4 Self-Regulatory Organization ("SRO") proceedings in which the person:

005.18B4a Was found to have caused an investment-related business to lose its authorization to do business; or

005.18B4b Was found to have been involved in a violation of the SRO's rules and was the subject of an order by the SRO barring or suspending the person from association with other members, or expelling the person from membership; or fining the person more than \$2,500, or otherwise significantly limiting the person's investment-related activities.

005.18B5 For purposes of calculating the 10-year period during which events are presumed to be material under Section 005.018B, the date of a reportable event shall be the date on which the final order, judgment, or decree was entered, or the date on which any rights of appeal from preliminary orders, judgments, or decrees lapsed.

005.18C The information required to be disclosed by Section 005.18 shall be disclosed to clients within 30 days, and to prospective clients not less than 48 hours prior to entering into any written investment advisory contract, or no later than the time of entering into such contract if the client has the right to terminate the contract without penalty within five business days after entering into the contract.

005.18D For purposes of Section 005.18 of the Act:

005.18D1 Management person means a person with power to exercise, directly or indirectly, a controlling influence over the management or policies of an adviser which is a company or to determine the general investment advice given to clients.

005.18D2 Found means determined or ascertained by adjudication or consent in a final SRO proceeding, agency administrative proceeding, or court action.

005.18D3 Investment-related means pertaining to securities, commodities, banking, insurance, or real estate, including, but not limited to, acting as or being associated with a broker-dealer, investment company, investment adviser, government securities broker or dealer, municipal securities dealer, bank, savings and loan association, entity or person required to be registered under the Commodity Exchange Act, 7 U.S.C. § 1 et seq., or fiduciary.

005.18D4 Involved means acting or aiding, abetting, causing, counseling, commanding, inducing, conspiring with or failing reasonably to supervise another in doing an act.

005.18D5 Self-Regulatory Organization ("SRO") means any national securities or commodities exchange, registered association, or registered clearing agency.

005.18E Compliance with Section 005.18 shall not relieve any investment adviser from the obligations of any other disclosure requirement under the Act, the rules and regulations thereunder, or under any other federal or state law.

005.19 Entering into, extending or renewing any investment advisory contract, if such contract contains any provision which limits or purports to limit:

005.19A Liability of the adviser for conduct or omission arising from the advisory relationship which does not conform to the Act, applicable federal statutes, and common law fiduciary standards of care; or

005.19B Applicability of the laws of Nebraska with respect to the construction or interpretation of the contract provisions.

005.20 Failing to cooperate with, or providing false or incomplete information to, the Director in connection with an investigation.

005.21 Failing to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the misuse of material nonpublic information in violation of Section 204A of the Investment Advisers Act of 1940.

005.22 Entering into, extending or renewing any advisory contract which would violate Section 205 of the Investment Advisers Act of 1940, notwithstanding the fact that such adviser would be exempt from federal registration pursuant to Section 203(b) of the Investment Advisers Act of 1940.

005.23 Including a provision which purports to waive compliance with any provision of the Act or of the Investment Advisers Act of 1940 in any advisory contract, stipulation or other document binding on any person, or any other practice that would violate Section 215 of the Investment Advisers Act of 1940.

005.24 Engaging in any act, practice, or course of business which is fraudulent, deceptive or manipulative in contravention of Section 206(4) of the Investment Advisers Act of 1940, notwithstanding the fact that such investment adviser is not registered or required to be registered under Section 203 of the Investment Advisers Act of 1940.

005.25 Engaging in conduct or any act, indirectly or through or by any other person, which would be unlawful for such person to do directly under the provisions of the Act or any rule or regulation thereunder.

005.26 Federal statutory and regulatory provisions referenced herein shall apply to investment advisers and federal covered advisers, regardless of whether the federal provision limits its application to advisers subject to federal registration.